SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS,

Petitioner,

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE S. DIXON,
MACDONALD, DIXON & BEAN,

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Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, James F. Morris, a resident of Grosse Isle, Michigan, prays this Honorable Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its final judgment, entered on the 29th day of May, 1946, reversing a judgment of the District Court of the United States for the Eastern District of Michigan.

Statement of the Matter Involved

This case involves a determination of the applicability of the provisions of the Fair Labor Standards Act of 1938

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(29 U. S. C. sec. 201, *et seq.*) to general cartage operations conducted by a common carrier for hire, such operations being conducted through motor vehicle movements which are physically intrastate but which involve the movement of both intrastate and interstate traffic. In particular, the case involves a determination of whether an employer so engaged may properly be enjoined from claimed violation of the Act upon complaint of the Administrator of the Wage and Hour Division, United States Department of Labor.

Such complaint was filed against Petitioner by the Administrator of the Wage and Hour Division, United States Department of Labor, in the United States District Court for the Eastern District of Michigan on March 26, 1942, seeking injunctive relief. The case was presented to the District Court upon an agreed stipulation of facts followed by oral argument. The District Court judgment dismissing the Administrator's Complaint on September 26, 1945, was reversed by judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered May 29, 1946.

Jurisdictional Statement

Jurisdiction to review a final judgment of the United States Circuit Court of Appeals is conferred upon this Court by statute (U. S. Code, Title 28, Section 347). This Petition for Writ of Certiorari seeks review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit.

Questions Presented

The questions presented for determination are as follows:

1. Are employees of a common carrier for hire who conducts a general cartage business engaged in the "production of goods for commerce" where the performance of their

usual and normal duties in the cartage operation involves the transportation of property which, after further processing and fabrication, becomes a part or ingredient of other products which are shipped in commerce in their finished form?

2. Where such employees during a minority of their time are engaged in the transportation of interstate traffic are they exempt under the provisions of Section 13(b)(1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U. S. C. sec. 301, *et seq.*)?

Reasons Relied upon for Allowance of Writ

Petitioner advances the following reasons as grounds upon which this Honorable Court should, in its discretion, grant a Writ of Certiorari as herein prayed:

1. Applicability of the provisions of the Fair Labor Standards Act to the motor vehicle operations of common carriers for hire who engage solely in transportation as an independent enterprise is a matter of substantial and national importance. The decision of this question by the United States Circuit Court of Appeals for the Sixth Circuit appears to rest upon Court decisions in which the common carrier status of the employer either is not involved or is not considered. In the absence of review by this Court, the question remains undecided as to whether regulation under the Fair Labor Standards Act is to be extended to transportation enterprises on the basis of court decisions relating to pure productive enterprises.

2. The applicability of the exemption set forth in Section 13(b)(1) of the Act requires an interpretation of the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935. The Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor, differ in their interpretation of Section 13(b)(1) of the Fair Labor Standards Act and of Section 204 of the Motor Carrier Act. The Circuit Court of Appeals for the Second Circuit (*Walling* v. *Comet Carriers*, 151 Fed. (2nd) 107; *Ispass* v. *Pyramid Motor Freight Corp.*, 152 Fed. (2nd) 619) and the Circuit Court of Appeals for the Sixth Circuit (*Fletcher* v. *Grinnell Brothers*, 150 Fed. (2nd) 337; *West Kentucky Coal Company* v. *Walling*, 153 Fed. (2nd) 582; *Walling* v. *Morris*, 155 Fed. (2nd) 832) have both taken an interpretive position at variance with that of both the Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor. The Illinois Supreme Court has taken an interpretive position which is believed to vary to some degree from that taken by the above Circuit Courts of Appeal (*Levinson* v. *Spector Motor Service*, 389 Ill. 466). In three of the cases above cited, certiorari with respect to this issue was granted by this Court, and two of the cases in which certiorari was granted on this issue are presently pending before this Court, the third having been dismissed upon motion of the Petitioner. This would indicate that this issue involves an important question of Federal law which has not been, but should be, settled by this Court.

Prayer for Issuance of Writ of Certiorari

WHEREFORE, Petitioner respectfully prays this Court for the issuance of a Writ of Certiorari to the United States

Circuit Court of Appeals for the Sixth Circuit to review its final judgment in the above cause, entered May 29, 1946.

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Petitioner;
By GEORGE S. DIXON.
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Dated: Detroit, Michigan, August 20, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS,

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Nature of Controversy

This case arises under the Fair Labor Standards Act of 1938 (29 U. S. C. sec. 201 *et seq.*) upon complaint filed by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Act, to restrain James F. Morris, hereinafter referred to as Petitioner, from violation of Sections 15(a)(1) and 15(a)(2) of the Act. The complaint was filed in the United States District Court for the Eastern District of Michigan. The case was submitted to the District Court on an agreed

stipulation of facts followed by oral argument. The District Court entered judgment dismissing the Administrator's Bill of Complaint.

Decree Sought to Be Reviewed

Review is here sought of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered May 29, 1946, reversing the judgment of the District Court for the Eastern District of Michigan which dismissed the Administrator's Bill of Complaint.

Reference to Official Reports

The conclusions of law by the United States District Court for the Eastern District of Michigan are not officially reported.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 155 Fed. (2nd) 832.

Statement of Jurisdiction

Review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit by Writ of Certiorari is sought of this Court within the discretionary powers conferred upon this Court by statute (U. S. Code, Title 28, Section 347).

Summary of Evidence

This case was presented to the United States District Court for the Eastern District of Michigan upon a stipulation of facts (R. 11-27) and supplement to stipulation of facts (R. 28-38). The stipulation of facts and the supplement to stipulation of facts are relatively concise and may warrant examination in their entirety. For purposes of this Brief, however, this summary of the evidence is confined to those facts believed to be material to a decision

of the questions specifically raised for review in the Petition for Certiorari.

Petitioner, James F. Morris, is the sole owner and operator of the J. F. Morris Cartage Company, which is operated as a sole proprietorship. Under such name, Petitioner is engaged as a common carrier for hire in the local transportation of property by motor vehicle in and about the metropolitan area of Detroit, Michigan, all of such operations being physically intrastate (R. 11).

In the regular course of his business during the calendar year 1941, Petitioner employed approximately sixty persons of whom approximately forty were truck drivers and fourteen were garage employees (R. 11).

Although Defendant is engaged in the general cartage business and is prepared to render such service to the general shipping public, approximately ninety-seven per cent (97%) of the total revenue derived by Petitioner from such cartage services is received for services performed for two steel corporations located in Ecorse, Michigan (R. 12).

Of Petitioner's operations during the year 1941, approximately sixty per cent (60%) consisted of the transportation of steel from steel mills in Ecorse to manufacturing and industrial establishments in Detroit. Approximately thirty-five per cent (35%) consisted of the transportation of steel within the steel mills or between the steel mills located in Ecorse and the steel is so transported for purpose of further processing in the course of its manufacture prior to sale and shipment. An unsegregated portion of the steel so produced is shipped in commerce. In performing these operations Petitioner's trucks often operate within the plant and without leaving the plant for several days (R. 12).

Of the remaining operations of Petitioner approximately three per cent (3%) consists of the transportation of freight

to or from boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit area involving the pick up or delivery of freight moving in continuous transportation in interstate commerce. Defendant's compensation for such latter transportation is in some instances paid by connecting interstate carrier and in other instances by the shipper. Approximately one per cent (1%) consists of the transportation of freight from industrial establishments in Detroit to the steel mills in Ecorse and approximately one per cent (1%) consists of the transportation of miscellaneous freight in general cartage service for hire for miscellaneous shippers (R. 13).

The steel transported by Petitioner during the year 1941 from the steel mills in Ecorse to the manufacturing or industrial establishments in Detroit consisted principally of types of steel commonly used in the manufacture of automobiles and parts and since the effective date of the Fair Labor Standards Act such consignee firms have been engaged in the production and shipment in interstate commerce of finished products incorporating the types of steel transported by Petitioner (R. 14).

An examination and analysis of the driving activity of Petitioner's drivers during the year 1941 revealed that out of 19,786 trips examined, 19,062 or 96.35% represented interplant movements, the balance being pickup or delivery trips involving the transportation of interstate freight (R. 15).

Further analysis reveals that in an average workweek in 1941, 75.6% of the drivers were exclusively engaged in interplant trips and the remaining 24.4% of the drivers made one or more pickup or delivery trips involving interstate traffic. The "average employee" was exclusively engaged in interplant transportation during 75.6% of the workweeks. Two employees were exclusively engaged in

interplant hauling during the full year and with the exception of two other employees, all of Petitioner's drivers were exclusively engaged in interplant hauling during the greater part (fifty per cent (50%) or more) of the workweeks in the year 1941 (R. 16).

Petitioner's garage employees and drivers have been employed on an hourly rate basis and have been employed for a number of hours in excess of the maximum hours provided by Section 7 of the Act but have not received compensation in excess of the regular hourly rate for such overtime employment with the exception noted below (R. 18).

Since August 1, 1940, Petitioner's drivers have been employed pursuant to the terms of a collective bargaining agreement under which overtime compensation is paid for hours worked in excess of the workweek established by that contract, formerly fifty-two hours and latterly fifty-four hours (R. 18).

The collective bargaining agreements referred to above were union contracts which were in full force in the Detroit metropolitan area and covered all union drivers engaged in general cartage operations within the Detroit metropolitan area, whether employed by companies engaged exclusively in a general cartage business or employed by companies engaged in interstate operation, but employed to perform services competitive with those performed by Petitioner's employees (R. 19-28, 29).

Specification of Assigned Errors

Petitioner alleges that the United States Circuit Court of Appeals for the Sixth Circuit committed error in its entry of judgment on May 29, 1946, in the following particulars:

1. In concluding as a matter of law that Petitioner's employees were engaged in the "production of goods for com-

merce" within the meaning of Section 3(j) of the Fair Labor Standards Act while engaged in the performance of transportation or in the performance of duties necessary to such transportation in connection with general cartage operations conducted by a common carrier for hire.

2. In concluding as a matter of law that an employee of a motor carrier must devote a substantial part of his time to the performance of duties affecting the safety of operation of motor vehicles in interstate commerce before such employee falls within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

3. In finding as a matter of fact that no employee of Petitioner did spend a substantial portion of his time in the performance of duties affecting the safety of operation so as to bring such employee within the provisions of the exemption set forth in Section 13(b)(1) of the Fair Labor Standards Act.

Argument

1. *Petitioner Is Engaged Exclusively in Transportation*

Petitioner, an individual, conducts a local cartage business, in the Detroit Metropolitan Area, as a common carrier by motor vehicle. His transportation operations are physically intrastate but involve the handling of both interstate traffic and intrastate traffic. His employees are engaged exclusively in transportation or in activities related to transportation.

The Administrator of the Wage and Hour Division, United States Department of Labor, seeks to enjoin Petitioner from violations of the Fair Labor Standards Act under a theory that Petitioner's employees are engaged in the "production of goods for commerce" and are beyond the scope of any exemption contained in the Act. Petitioner

contends that his employees are not engaged in the "production of goods for commerce"; that the majority of them are employees subject to regulation by the Interstate Commerce Commission under the Motor Carrier Act of 1935, and therefore excluded from regulation as to maximum hours under Section 13(b)(1) of the Fair Labor Standards Act of 1938; and that he himself is engaged as a common carrier in the transportation in the regular course of his business of goods which he does not produce, thereby taking to himself the benefit of the exemption set forth in Section 15(a)(1) of the Fair Labor Standards Act.

2. *Transportation, Conducted as a Separate Enterprise, Does Not Constitute Production*

Transportation conducted by a common carrier for hire does not constitute "production of goods for commerce" in fact, nor within the intent of Congress. Congress did not intend to obliterate all distinction between production and transportation. *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 504. Transportation traditionally has been considered a commercial enterprise and not a productive enterprise. It cannot be transmuted into a productive enterprise by mere definition. The Federal regulatory power over commerce finds its birth in the Constitution and not in Congressional definition.

3. *Congress Did Not Intend to Regulate Intrastate Transportation as Production of Goods*

The power of Congress to regulate commerce extends only to interstate commerce. *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 403 U. S. 453, 466. Congress has made no attempt to regulate the transportation of intrastate freight by a motor carrier under either the Motor Carrier Act, Title 49 U. S. C. A. Sec. 303(a) (10), or within its

definition of "commerce" in the Fair Labor Standards Act, Title 29, U. S. C. A., Sec. 203(b). It could not have intended to extend Federal regulation to the intrastate transportation of freight by a motor carrier through the mere device of including "transportation" within its definition of the word "produce" in Section 3(j) of the Act, Title 29, U. S. A., Sec. 203(j), because in enacting the Fair Labor Standards Act, Congress did not see fit to exhaust its congressional jurisdiction over commerce, *10 E. 40th St. Bldg., Inc.* v. *Callus*, 325 U. S. 578, 579, to the extent that it did in enacting the Interstate Commerce Act, an Act expressly directed to the regulation of transportation.

4. *Intrastate Transportation Constitutes a Local Enterprise Subject to State Regulation*

The transportation of intrastate freight has long been considered subject to the regulatory power of the State governments. By the time the Interstate Commerce Commission had instituted its investigations of the necessity of establishing maximum hours of employment for employees engaged in transportation of interstate freight, forty-three States, including Michigan, and the District of Columbia had enacted laws prescribing a maximum limit on hours of service for drivers of for-hire vehicles. Ex Parte MC 2, 3 MCC 665, 683; *U. S. et al.* v. *American Trucking Associations Inc.*, 310 U. S. 534, 545; Michigan Public Acts, Act 314, 1937.

Congress left local enterprise to regulation by the States. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570. The Courts should not absorb by adjudication essentially local activities. *10 E. 40th St. Bldg., Inc.* v. *Callus*, 325 U. S. 578, 582. It is difficult to conceive of an enterprise more "local" than local cartage operations of a motor common carrier within the geographical confines of a single metro-

politan area. A common carrier is required by law to accept all freight tendered by the shipping public and thus is required to serve an unrestricted variety of patrons, one of the facts considered of significance in this Court's determination of what "spontaneously satisfies the common understanding of what constitutes a local business." *10 E. 40th St. Bldg., Inc.* v. *Callus, supra*, 583. Coverage under the Fair Labor Standards Act should not be dependent upon the pure contingency of the type of freight tendered to a common carrier for hire. Under such a theory, coverage and non-coverage could fluctuate from day to day and from week to week in response to the transportation requirements of the shipping public.

5. *Sec. 13(b) (1) Excludes a Majority of Petitioner's Employees from the Maximum Hours Provisions of Sec. 7*

Section 13(b)(1) of the Fair Labor Standards Act excludes from the maximum hours provisions of Section 7 employees with respect to whom the Interstate Commerce Commission has jurisdiction to establish qualifications and maximum hours of service under the provisions of Section 204 of the Motor Carrier Act, 1935. The jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act extends to employees whose duties affect safety of operation. *United States et al.* v. *American Trucking Associations Inc.*, 310 U. S. 534. This includes motor vehicle operators, and the Interstate Commerce Commission has in fact regulated maximum hours of drivers. Ex parte MC 2, 3 M. C. C. 665. Most of the employees with whom we are here concerned are truck drivers (R. 11).

6. *Two Federal Agencies and the Circuit Court of Appeals Disagree on the Proper Interpertation of Sec. 13(b)(1)*

The Interstate Commerce Commission interprets its jurisdiction to regulate maximum hours of service as broad

enough to cover truck drivers engaged in transporting interstate freight on a single trip during the workweek. Ex Parte No. MC3, 23 MCC1, 39. The Administrator of the Wage and Hour Division interprets the Section 13(b)(1) exemption more narrowly, holding that any truck driver who spends the greater part of his time during any workweek in the performance of non-exempt activities is not within the scope of the exemption. Interpretive Bulletin No. 9, CCH Labor Law Service, paragraph 32,109.

The Second Circuit Court of Appeals has rejected both interpretations, holding that the Administrator's interpretation is too narrow in view of the absence of any language in the Motor Carrier Act limiting the jurisdiction of the Interstate Commerce Commission, but maintaining that the duties performed by the employee must *substantially* affect safety of operations in the movement of interstate freight before the exemption becomes operative. *Walling* v. *Comet Carriers, Inc.*, 151 Fed. (2nd) 107, 111; *Ispass* v. *Pyramid Motor Freight Corp.*, 152 Fed. (2nd) 619. The Sixth Circuit Court of Appeals has applied the same "substantiality" test in determining applicability of the exemption *Fletcher* v. *Grinnell Bros.*, 150 Fed. (2nd) 337, 340; *West Kentucky Coal Co.* v. *Walling*, 153 Fed. (2nd) 582, 586; *Walling* v. *Morris*, 155 Fed. (2nd) 832, 836. The issue is now pending before this Court. *Levinson* v. *Spector Motor Service*, 389 Ill. 466, Case No. 139; *Pyramid Motor Freight Corp.* v. *Ispass*, *supra*, Case No. 821.

7. Scope of Sec. 13 (b) (1) Exemption Should Not Depend Upon Degree of Employee Activity

The adoption and application of the "substantiality" test by the courts is said by them to be supported by the conclusions of the Interstate Commerce Commission in Ex Parte MC 2, 28 M. C. C. 125, 131, to the affect that its

jurisdiction extends only to employees who devote a substantial part of their time to activities which directly affect safety of operations. However, if the Commission's report in 28 M. C. C. 125 is read in its entirety it is obvious that the Commission was applying the test of substantiality to *classes* of employees rather than to the *individual* activities of an *individual* employee. This is evidenced by the Commission's conclusions (Page 133 of the report) that mechanics, *as a class*, devote a large portion of their time to activities which directly affect the safety of operations of motor vehicles, within the jurisdiction of the Commission. Same conclusion with respect to loaders, *as a class*, page 134. Same conclusion with respect to helpers, *as a class*, page 136. Contrary conclusion with respect to garage employees other than mechanics, *as a class*, page 133, and with respect to dispatchers, *as a class*, page 135. In any event, the jurisdiction of the Interstate Commerce Commission is established by statute and not by Commission interpretation and Sec. 204 of the Motor Carrier Act contains no restriction upon the Commission's jurisdiction based upon degree of activity.

The adoption and application of the substantiality test to the individual activities of the individual employee would burden the Commission with problems of enforcement and plague the courts with factual controversy. Further, to the extent that the individual activities of the individual employee may be found to be so unsubstantial as to remove the employee from the jurisdiction of the Commission, the power of the Commission to regulate transportation in the interests of safety will be impaired. The courts should hesitate to impair the jurisdiction of the Interstate Commerce Commission even though they may think that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act. Dissenting

Opinion, *Boutell, d/b/a F. J. Boutell Service Company* v. *Walling*. 66 S. Ct. 631, 637, 326 U. S. Case No. 73 October 1945.

8. *The Decision Below Defeats the Purpose of the Section 13 (b)(1) Exemption*

The claimed purpose of the Section 13(b)(1) exemption was to avoid regulation of hours of service by two governmental agencies by entrusting the duty to the Interstate Commerce Commission. 81 Congressional Record 7875 (1937). "By exempting the drivers of motors from the maximum hours limitation of the Fair Labor Standards Act, Congress evidently relied upon the motor carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime." *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 48.

Nothing in this record nor in the whole history of trucking operations will indicate that intrastate transportation of property by motor vehicle is any less a business requiring fluctuating hours of employment, without the burden of additional pay for overtime, than interstate transportation of property by motor vehicle. The extension of coverage of the Fair Labor Standards Act to intrastate transportation under the theory that it constitutes production of goods and the removal of interstate transportation from coverage under the theory that it constitutes commerce rather than production of goods, reflects a differentiation and discrimination between the two types of transportation based upon an unreasonable and arbitrary classification. One of the Congressional purposes in enacting the Fair Labor Standards Act was the provision of overtime pay to lessen the irritations created by the existence of long hours in com-

petitive industries which might impede the free interstate flow of commodities by creating friction between production areas with different length workweeks and by offering opportunities for unfair competition which would induce labor discontent. *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316, U. S. 572, 576.

It is disclosed by this record (R. 19, 28, 29) that motor carriers performing interstate transportation and regulated on a sixty-hour maximum week basis by the Interstate Commerce Commission operate in competition with Petitioner as to whose operations maximum hour regulation on the basis of a forty-hour week is here sought to be extended, both classes of carriers being parties to an identical union contract establishing a uniform wage scale and uniform workweek. If Petitioner is required to pay overtime compensation for hours of employment in excess of forty during a given workweek, while his competitors, due to exclusion as interstate operators, are permitted to operate on a sixty-hour week basis, without overtime compensation, Petitioner is placed at a competitive disadvantage with such competitors and such competitor's employees are placed at an economic disadvantage in comparison with Petitioner's employees. This will tend to create the very basis for labor discontent and unfair competition which Congress allegedly sought to alleviate or to eliminate in its enactment of the Fair Labor Standards Act. *Overnight Motor Transportation Co., Inc.* v. *Missel, supra.*

9. *Conclusion of Argument*

The United States Circuit Court of Appeals for the Sixth Circuit was in error in concluding that the activities of employees of a motor common carrier conducting local cartage operations in a single metropolitan area were engaged in the "production of goods for commerce" and that they were

not excluded from the maximum hours provisions of the Act under the provisions of Section 13 (b) (1) in view of the degree of their activities in interstate commerce as disclosed on this record. The final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, 155 Fed. (2nd) 832 should be reviewed by Writ of Certiorari.

Respectfully Submitted,

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Petitioner;

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Dated: Detroit, Michigan, August 20, 1946.

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